CRIMINAL YEAR SEMINAR

April 12, 2013 - Phoenix, Arizona
April 19, 2013 - Tucson, Arizona
April 26, 2013 - Mesa, Arizona

2012 CASE CITATIONS
ARIZONA EVIDENCE REPORTER
CONSTITUTIONAL LAW REPORTER - UNITED STATES
CONSTITUTIONAL LAW REPORTER - ARIZONA
CRIMINAL CODE REPORTER
CRIMINAL RULES REPORTER
FUNDAMENTAL ERROR REPORTER

Prepared By:

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Phoenix, Arizona

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2013 CRIMINAL YEAR SEMINAR
2012 Case Citations—Alphabetically

C = Constitutional Law Reporter
c = Criminal Code Reporter
r = Criminal Rules Reporter
e = Arizona Evidence Reporter

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fe = fundamental error
he = harmless error
se = structural error

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vacated, 230 Ariz. 387, 285 P.3d 308 (Apr. 11, 2012).

Depublished

State v. Burr, 229 Ariz. 467, 276 P.3d 536 (Ct. App. 2012).Cr
depublished, 231 Ariz. 18, 289 P.3d 946 (Sep. 25, 2012).

March 29, 2013

ARTICLE 1. GENERAL PROVISIONS.

Rule 103(a). Rulings on Evidence — Effect of erroneous ruling.

103.a.010 If a party is entitled to object to certain evidence during trial, the trial court has discretion to consider the objection by means of a motion in limine made before or during trial, even though the party makes this motion less than 20 days before the trial begins.

State v. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶ 11 (Ct. App. 2012) (during opening statement, defendant's attorney discussed possible third-party culpability and state objected; after opening statements, state again objected, and trial court precluded that evidence; because state could have objected to admission of evidence of third-party culpability during trial, state was not required to filed written objection 20 days prior to trial, and trial court did not abuse discretion in considering state's objection made after trial had started).

103.a.020 To preserve for appeal the question of admission of evidence, a party must make a specific and timely objection; if the party **fails to object,** the party will have waived the issue on appeal.

Henricks v. Arizona DES, 229 Ariz. 47, 270 P.3d 874, ¶ 20 (Ct. App. 2012) (because Henricks failed to object to admission of handwritten documents at administrative hearing, she did not preserve her right to challenge ruling on appeal).

State v. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶ 16 n.3 (Ct. App. 2012) (court rejected defendant's contention that he should be excused from objecting to award of restitution because he was "surprised" when trial court ordered restitution; court follows rule that party must make timely and specific objection).

103.a.050 An objection at trial for one reason or purpose does not preserve for appeal a claim of error based on a different reason or purpose.

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 19–25 (Ct. App. 2012) (defendant objected to admission of property receipt for "Nike shoe box containing a large amount of U.S. currency" under Rules 401, 403, and 404(b); because defendant did not object on either hearsay or Confrontation Clause grounds, court reviewed for fundamental error only; court concluded there was substantial circumstantial evidence of defendant's guilt, thus defendant failed to establish prejudice).

ARTICLE 3. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301. Presumptions in Civil Cases Generally.

344. Judicial officers.

344.030 A trial judge is presumed to be free of bias or prejudice, thus a party moving for a change of judge for cause based on bias or prejudice has the burden of proving alleged facts by a preponderance of the evidence; bare allegations of bias and prejudice, unsupported by factual evidence, are insufficient to overcome the presumption and do not require recusal.

Cardoso v. Soldo, ___ Ariz. ___, 277 P.3d 811, ¶ 19 (Ct. App. 2012) (plaintiff-appellant failed to make necessary showing).

396. Under the influence.

396.010 Pursuant to A.R.S. § 28–1381(G), if a person has a BAC of 0.08 or more, it may be presumed the person was under the influence of intoxicating liquor; if a person has a BAC of 0.05 or less, it may be presumed the person was not under the influence of intoxicating liquor; if a person has a BAC of more than 0.05 but less than 0.08, there shall be no presumption the person was or was not under the influence of intoxicating liquor.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶ 7 (Ct. App. 2012) (court makes general statement about presumption with BAC of 0.08 or more).

.010 For a charge under A.R.S. § 28–1381(A)(1), either party may introduce evidence of the defendant's BAC.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–17 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

.050 The statutory presumptions arise if a party introduces evidence of the defendant's BAC in a charge under A.R.S. § 28–1381(A)(1), and the trial court has a duty to so instruct the jurors if such evidence is introduced.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–18 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

ARTICLE 4. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence." (Civil Cases.)

401.civ.225 When property is sold at a trustee's sale, the lender is entitled to a deficiency judgment for the amount owed less either the fair market value or the sale price at the trustee's sale, whichever is higher, but the credit bid for the property is not admissible as evidence of value because it does not reflect a sale after reasonable exposure in the market under conditions requisite to a fair sale.

Midfirst Bank v. Chase, 230 Ariz. 366, 284 P.3d 877, ¶¶ 6–xx (Ct. App. 2012) (because only evidence of value lender presented was credit bid at trustee's sale, lender did not establish fair market value of property and thus trial court erred in granting lender's motion for summary judgment).

Rule 401. Definition of "Relevant Evidence." (Criminal Cases.)

401.cr.010 For evidence to be relevant, it must satisfy two requirements: **First,** the fact to which the evidence relates must be of consequence to the determination of the action (materiality).

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 45–47 (2012) (court stated, "[T]he fact and cause of death are always relevant in a murder prosecution"; court held photographs also helped to corroborate state's theory on timing of two deaths).

401.cr.020 For evidence to be relevant, it must satisfy two requirements: **Second,** the evidence must make the fact that is of consequence more or less probable (relevance).

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶¶ 45–47 (2012) (court stated, "[T]he fact and cause of death are always relevant in a murder prosecution"; court held photographs also helped to corroborate state's theory on timing of two deaths).

401.cr.042 For a charge of driving under the influence under A.R.S. § 28–1381(A)(1), either party may introduce evidence of the defendant's BAC.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶¶ 13–17 & n.6 (Ct. App. 2012) (court rejected state's argument that statutory presumptions on being under influence arose only when expressly invoked by state, and noted in footnote either party may introduce evidence of defendant's alcohol concentration, thereby triggering statutory presumptions).

401.cr.044 Once a party introduces evidence of the defendant's breath BAC in a charge under A.R.S. § 28–1381(A)(1), testimony about breath-to-blood partition ratios is relevant, and that includes partition ratios in the general population, and not just the defendant's partition ratio at the time of the breath test.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶¶ 19–25 (Ct. App. 2012) (court rejected state's argument that partition ratio evidence is limited to defendant's partition ratio at time of breath test).

401.cr.046 Although it is the amount of alcohol in the blood that causes impairment, because A.R.S. § 28–1381(A)(2) makes it unlawful to drive when having an alcohol concentration of 0.08 or more, which means either blood or breath, testimony about breath-to-blood partition ratios is not relevant to a charge under § 28–1381(A)(2).

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶ 25 (Ct. App. 2012) (court reaffirms this holding from *Guthrie v. Jones,* 202 Ariz. 273, 43 P.3d 601 (Ct. App. 2002)).

401.cr.048 For a charge under A.R.S. § 28–1381(A)(1) or (A)(2), if a party introduces evidence of a BAC reading taken from a breathalyzer, testimony of how breathing patterns, breath and body temperature, and hematocrit (device for separating cells and other particulate elements of blood from plasma) could affect the BAC reading is relevant.

State v. Cooperman, 230 Ariz. 245, 282 P.3d 446, ¶¶ 26–30 (Ct. App. 2012) (court rejected state's argument that such evidence is inadmissible unless defendant can offer evidence of own physiology at time of breath test).

401.cr.050 Arizona law makes no distinction between direct and circumstantial evidence.

State v. Bustamante, 229 Ariz. 256, 274 P.3d 526, ¶¶ 5–6 (Ct. App. 2012) (court considered circumstantial evidence to determine whether evidence was sufficient to show defendant's involvement in kidnapping).

401.cr.080 Evidence that a person did not say something (negative evidence) is relevant, but only if the proponent makes an adequate foundational showing that the person probably would have made a statement under the circumstances.

State v. VanWinkle, 229 Ariz. 233, 273 P.3d 1148, ¶ 7 (2012) (defendant shot victim, G. disarmed defendant and C. restrained him on second-floor balcony; police arrived and ordered C. to descent stairs; C. complied but exclaimed that defendant was shooter; defendant said nothing in response; defendant did not contend his silence was improperly admitted as tacit admission, but contended statement was admitted in violation of *Miranda*; court held admission of statement did not violate *Miranda,* but did violate Fifth Amendment right to remain silent; court held any error was harmless).

401.cr.115 In determining whether to admit evidence that another person may have committed the crime, the court must assess the effect this evidence would have on the defendant's culpability; if the evidence merely casts suspicion or speculation about a class of persons and does not show that another person had the motive and opportunity to commit the crime, this would not tend to create a reasonable doubt about the defendant's guilt, so that evidence would not be relevant and thus not admissible.

State v. Alvarez, 228 Ariz. 579, 269 P.3d 1203, ¶¶ 3–7 (Ct. App. 2012) (victim's home was burglarized, and water bottle with defendant's DNA was found in kitchen; defendant contended trial court erred in excluding evidence concerning R., who was landscaper: (1) R. was present in victim's back yard pursuant to schedule when victim left home prior to burglary, (2) R. had worked at victim's house on six to eight prior occasions and presumably knew she would not return anytime soon; (3) R. was in victim's fenced back yard, which gave ready access to point of entry, back door of house; (4) R. never returned to victim's house in 4 years following burglary; and (5) R. had prior felony conviction for property crime; court held none of this evidence connected R. to burglary, thus trial court properly excluded that evidence).

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.

402.017 If a contract contains a written expression of the parties' intent that the contract represents a complete and final agreement between them (integration clause), then parol evidence rule renders inadmissible any evidence of any prior or contemporaneous oral understandings and any prior written understandings that would contradict, vary, or add to the written contract.

Best v. Miranda, 229 Ariz. 246, 274 P.3d 516, ¶ 11 (Ct. App. 2012) (plaintiff claimed he exercised option to purchase real property, and contended trial court erred in failing to consider evidence of parties' oral agreement of what would be sufficient to exercise option; court held evidence of any oral agreement would be inadmissible under statute of frauds).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. (Criminal Cases.)

401.cr.022 A defendant's Sixth Amendment right to present evidence is limited to the presentation of matters admissible under ordinary evidentiary rules, thus exclusion of evidence because probative value is substantially outweighed by factors listed in Rule 403 does not violate defendant's constitutional right to present evidence.

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶¶ 46–51 (2012) (court held trial court did not abuse discretion in excluding defendant's personal history evidence during guilt phase).

403.cr.030 Because evidence that is relevant will generally be adverse to the opposing party, use of the word "prejudicial" to describe this type of evidence is incorrect and cannot be the basis for excluding evidence under this rule; evidence is "*unfairly* prejudicial" only if it has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror.

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶ 40 (2012) (trial court could reasonably find evidence of defendant's slapping victim was more probative than prejudicial because defendant's motive and intent were significant issues at trial; further, trial court properly instructed jurors on limited use of this evidence).

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 26–35 (Ct. App. 2012) (defendant was charged with conspiracy to possess or transport marijuana for sale; defendant objected to admission of property receipt from Georgia sheriff's department for "Nike shoe box containing a large amount of U.S. currency"; because receipt was dated less than 1 week before Arizona authorities found drugs and weapons, and cash in box in house where defendant was visiting, trial court reasonably concluded receipt directly proved alleged conspiracy or that transporting large amounts of cash was done contemporaneously with and directly facilitated charged conspiracy; additionally, receipt showed defendant had Florida address, and evidence for current charges showed large amounts of marijuana were shipped to Florida; evidence was thus intrinsic; trial court did not abuse discretion in finding probative value was not substantially outweighed by danger of unfair prejudice).

Rule 404(b). Other crimes, wrongs, or acts. (Civil cases.)

404.b.civ.090 Extrinsic evidence of another crime, wrong, or act is admissible if it is legally or logically relevant, which means it tends to prove or disprove any issue in the case, and thus is admitted for some purpose other than to show a person's criminal character.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶ 90 (Ct. App. 2012) (evidence of defendant Wolfswinkel's criminal convictions and civil judgments was relevant to show why plaintiffs did not want to deal with Wolfswinkel, why they instructed other defendant not to deal with Wolfswinkel, and why they claimed other defendant breached fiduciary duty in dealing with Wolfswinkel).

404.b.civ.100 If the **extrinsic** evidence of the other crime, wrong, or act is not relevant to any issue being litigated, then the only effect of that evidence is to show that the person has a bad character, and thus it would be error to admit the evidence.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 91–92 (Ct. App. 2012) (although evidence of defendant Wolfswinkel's criminal convictions and civil judgments was relevant to show why plaintiffs did not want to deal with Wolfswinkel, why they instructed other defendant not to deal with Wolfswinkel, and why they claimed other defendant breached fiduciary duty in dealing with Wolfswinkel, presentation of evidence caused trial to be more about Wolfswinkel's past and alleged proclivity for corruption, and closing argument was more about punishing Wolfswinkel for his past acts, thus trial court did not abuse its discretion in granting new trial).

Rule 404(b). Other crimes, wrongs, or acts. (Criminal cases.)

404.b.cr.010 Evidence of an "other act" is **intrinsic** only if (1) the evidence directly proves the charged offense, or (2) the evidence shows the other act is performed contemporaneously with and directly facilitates the commission of the charged offense.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶ 20 (2012) (court replaced the test adopted in 1996 and replaced it with this test).

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 25–28 (2012) (defendant was charged with sexual conduct with minor; trial court admitted evidence that, on ride to defendant's house on night of first charged offense, defendant told victim to pull down his pants and underwear and expose himself, and threatened to leave victim on side of road if he did not comply; evidence further showed defendant and victim arrived at defendant's house, victim talked to defendant's mother and played computer games for at lease 30 minutes while defendant showered, victim then joined defendant in bed, at which time defendant completed first charged act; court held evidence of exposure in car did not meet narrow definition of intrinsic evidence because two acts were qualitatively different and constituted two separate instances of sexual abuse, and further held, because trial court allowed evidence of exposure in car to be offered to prove defendant's propensity to commit charged act, trial court erred in admitting that evidence without screening it under Rule 404(c)).

State v. Butler, 230 Ariz. 465, 286 P.3d 1074, ¶¶ 26–32 (Ct. App. 2012) (defendant was charged with conspiracy to possess or transport marijuana for sale; defendant objected to admission of property receipt from Georgia sheriff's department for "Nike shoe box containing a large amount of U.S. currency"; because receipt was dated less than 1 week before Arizona authorities found drugs and weapons, and cash in box in house where defendant was visiting, trial court reasonably concluded receipt directly proved alleged conspiracy or that transporting large amounts of cash was done contemporaneously with and directly facilitated charged conspiracy; additionally, receipt showed defendant had Florida address, and evidence for current charges showed large amounts of marijuana were shipped to Florida; evidence was thus intrinsic).

404.b.cr.020 If the other act is **intrinsic** and thus evidence of this other act is **intrinsic evidence,** this other act is not a separate crime, wrong, or act, thus **intrinsic evidence** is admissible without going through a Rule 404(b) or Rule 404(c) analysis.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 11, 22 (2012) (court stated evidence of intrinsic acts, including evidence of similar sex act committed with same child that is intrinsic, is not subject to Rule 404(c) screening).

404.b.cr.030 If the other act is **intrinsic** and thus evidence of this other act is **intrinsic evidence** and thus admissible without going through a Rule 404(b) or Rule 404(c) analysis, it may additionally be admissible for other relevant purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or to show the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶ 12 (2012) (court stated evidence of defendant's other sexual acts with same victim might also be admissible under Rule 404(b) or Rule 404(c)).

404.b.cr.040 If the other act is not **intrinsic** and thus evidence of this other act is not **intrinsic evidence,** the evidence may still be admissible under Rule 404(b) for other relevant purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, or admissible under Rule 404(c) to show the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12, 23–24 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rule 404(b) or Rule 404(c)).

404.b.cr.090 Extrinsic evidence of another crime, wrong, or act is admissible if it is legally or logically relevant, which means it tends to prove or disprove any issue in the case, and thus is admitted for some purpose other than to show the defendant's criminal character.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12–13 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rule 404(b) or Rule 404(c)).

State v. Gonzalez, 229 Ariz. 550, 278 P.3d 328, ¶¶ 8–16 (Ct. App. 2012) (officer stopped vehicle driven by A-P; defendant was passenger; officer ultimately removed windshield of vehicle and found methamphetamine worth $112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to "unknowing transporter" because they need to know person can be trusted and drugs are going to get to destination; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant's contention he did not know drugs were in vehicle).

404.b.cr.150 The amount of time between the charged act and the other act goes to the weight and not the admissibility of the other act.

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶ 11 (2012) (court held 8 days between murders and defendant's flight went to weight of evidence and not admissibility).

404.b.cr.190 Extrinsic evidence of another crime, wrong, or act is relevant to show **consciousness of guilt.**

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶ 11 (2012) (defendant was charged with first-degree murder; court stated evidence of flight is admissible to show consciousness of guilt when defendant flees in manner that obviously invites suspicion or announces guilt; court held 8 days between murders and defendant's flight went to weight of evidence and not admissibility).

State v. Cota, 229 Ariz. 136, 272 P.3d 1027, ¶ 12 (2012) (defendant was charged with first-degree murder; defendant contended flight evidence was inadmissible because he may have been fleeing because he had violated probation and had drugs in car; court held evidence of flight is not *per se* inadmissible merely because person is wanted on another charge; court held circumstances justified inference defendant was fleeing from more serious crime).

404.b.cr.225 Evidence of how drug organizations operate may be admissible to show ***modus operandi*** of such organization and thus may be relevant.

State v. Gonzalez, 229 Ariz. 550, 278 P.3d 328, ¶¶ 8–16 (Ct. App. 2012) (officer stopped vehicle driven by A-P; defendant was passenger; officer ultimately removed windshield of vehicle and found methamphetamine worth $112,500 hidden in area under windshield; defendant denied knowing drugs were in vehicle; trial court admitted testimony that drug-trafficking organizations have profit motive and do not typically entrust large amounts of drugs to "unknowing transporter" because they need to know person can be trusted and drugs are going to get to destination; court held this evidence was not admitted as drug courier profile evidence, but was instead properly admitted to counter defendant's contention he did not know drugs were in vehicle).

404.b.cr.230 Extrinsic evidence of another crime, wrong, or act is relevant to show **intent,** but intent is only an issue when the defendant acknowledges doing the act, but denies having the intent the statute requires, thus a blanket denial of criminal conduct does not put intent in issue.

State v. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶¶ 22–24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; because defendant contended he acted in self-defense and thus was justified in killing victim, state was permitted to introduce evidence of other occasions when defendant attacked others in jail facility without justification).

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶¶ 32–39 (2012) (evidence that defendant had prior argument with victim and slapped her, and evidence he was searching for her, all showed defendant's intent).

State v. Hardy, 230 Ariz. 281, 283 P.3d 12, ¶ 41 (2012) (evidence that defendant gave gun to someone and later retrieved it showed defendant intended to kill victims).

404.b.cr.320 Extrinsic evidence of another crime, wrong, or act is relevant **to rebut areas opened** by the other party.

State v. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶¶ 18–20 (2012) (defendant killed victim while they were inmates in Maricopa County jail; defendant testified "inmate rules" required prisoners to resolve disputes themselves without involving jail staff; because defendant opened door to this area, state was allowed to cross-examine defendant about other situations when he chose not to follow prison facility rules).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 70–71 (2012) (defendant testified Dieteman was bisexual but he was not, and sexually-themed text messages between them were intended to be humorous, and attempted to distance himself from Dieteman by characterizing their respective sexual orientations; court held trial court properly allowed state to cross-examine defendant about his sexuality and to have wife testify she had seen him kiss another man and once told her he thought he was gay).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 72–74 (2012) (defendant testified he was not violent person, he would never harm person or animal, and would never harm anything; court held trial court properly allowed Dieteman to testify he and defendant set palm tree on fire and slashed tires in casino parking lot; court held Dieteman's testimony he and defendant regularly shoplifted alcohol was not admissible to rebut defendant's assertion he was not violent person but was perhaps relevant to rebut defendant's assertion he magnanimously allowed Dieteman to live with him inasmuch as both were earning money stealing; court held any error was, however, harmless).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 75–76 (2012) (defendant testified he knew his brother stabbed person but he was not present at stabbing, and had never been present when his brother and Dieteman stabbed person and had not met Dieteman until several days after stabbing; court held trial court properly allowed Dieteman to testify he and defendant were present when Defendant's brother stabbed person).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 77–78 (2012) (defendant testified he thought murders were tragic and thought that way during entire trial; court held trial court properly allowed testimony from victim and mother of another victim, both of whom said defendant "had gestured to them by raising his middle finger").

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 79–80 (2012) (defendant testified he was not violent person; court held trial court properly allowed defendant's ex-wife to testify about specific incidents of violence, including defendant held her at gunpoint in desert, and chased her in car, caught her, and ripped her clothing).

404.b.cr.320 **Extrinsic** evidence of another crime, wrong, or act is relevant **to rebut defendant's justification defense.**

State v. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶¶ 22–24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; because defendant contended he acted in self-defense and was thus justified in killing victim, state was permitted to introduce evidence of other occasions when defendant attacked others in jail facility without justification).

404.b.cr.505 Because the state must prove a crime beyond a reasonable doubt, but must only prove other acts by clear and convincing evidence, trial court may admit evidence of crimes for which defendant has been acquitted without violating prohibition against double jeopardy.

State v. Yonkman, 229 Ariz. 291, 274 P.3d 1225, ¶¶ 16–21 (Ct. App. 2012) (defendant was charged with sexual abuse and sexual contact with 15-year-old step-daughter; court held trial court properly allowed admission of evidence defendant had molested two of victim's friends, even though defendant had been found not guilty of those charges).

404.b.cr.720 If the defendant requests an instruction informing jurors of the limitation on the use for which they may consider this type of evidence, the trial court must give it, but if the defendant does not request such an instruction, the trial court is not required to give one *sua sponte.*

State v. VanWinkle, 230 Ariz. 387, 285 P.3d 308, ¶ 24 (2012) (defendant killed victim while they were inmates in Maricopa County jail; to rebut defendant's self-defense/justification defense, trial court admitted evidence of other occasions when defendant attacked others in jail facility without justification; defendant did not request limiting instruction).

404.b.cr.750 If the testimony about the other act is such that the jurors have likely learned defendant was tried and found not guilty of the other act, it is appropriate to instruct the jurors defendant was found not guilty.

State v. Yonkman, 229 Ariz. 291, 274 P.3d 1225, ¶¶ 22–26 (Ct. App. 2012) (because court reversed conviction on other grounds, court stated it need not address issue whether trial court abused its discretion in not giving such an instruction; court stated, "In any retrial, we trust the court will evaluate the issue in light of the standards set forth above.").

Rule 404(c). Character evidence in sexual misconduct cases. (Criminal Cases.)

404.c.cr.010 In a case in which a defendant or a party is alleged to have committed a sexual offense, evidence of other crimes, wrongs, or acts may be admitted to show the defendant or person had a character trait giving rise to an aberrant sexual propensity to commit the alleged sexual offense.

State v. Ferrero, 229 Ariz. 239, 274 P.3d 509, ¶¶ 12–13 (2012) (court stated evidence of defendant's other sexual acts with same victim might be admissible under Rule 404(b) or Rule 404(c)).

ARTICLE 5. PRIVILEGES

Rule 501. Privilege in General.

Attorney-Client.

501.155 The attorney-client privilege applies to communications between an attorney for a corporation, governmental entity, partnership, business association, or other similar entity or an employer, and any employee, agent, or member of the entity or employer, and protects communications about acts or omissions of or information from the employee, agent or member if the communication is either (1) for the purpose of providing legal advice to the entity, employer, employee, agent, or member, or (2) for the purpose of obtaining information in order to provide legal advice to the entity, employer, employee, agent, or member, but does not cover disclosure of facts.

Salvation Army v. Bryson, 229 Ariz. 204, 273 P.3d 656, ¶¶ 14–24 (Ct. App. 2012) (court held trial court abused discretion in ordering corporation to disclose summaries of interviews conducted by investigator employed by corporation's attorney with four of corporation's employees; on remand, trial court was to determine whether six of corporation's volunteers could be considered "agents" or "members" and thus whether their interviews would be privileged).

Psychologist-Patient.

501.720 The patient holds the psychologist-patient privilege, thus only the patient may make an objection to a violation of that privilege.

D'Amico v. Structural I Co., 229 Ariz. 262, 274 P.3d 532, ¶¶ 6–10 (Ct. App. 2012) (Structural I Co. (SIC) was family-owned company founded and operated by Mary Jo and Doug McLeod (McLeods), who were approaching retirement and seeing counselor Cottor (Cottor); Cottor suggested McLeods hire "bridge-CEO," and McLeods hired D'Amico for term of 5 years; after about 3 years, things did not go well and SIC discharged D'Amico, who sued SIC; SIC contended trial court should have excluded privileged testimony by Cottor about her personal counseling sessions with McLeods; court held only McLeods held privilege and only they could assert it, and because McLeods were not parties to litigation, SIC had no standing to assert privilege, thus trial court did not err in admitting that testimony).

Work Product.

501.780 The protection afforded an attorney by Rule 26(b)(3) does not pertain to privileged communications between attorney and client, and instead addresses the discovery of documents and other tangible things otherwise discoverable under Rule 26(b)(1) and prepared in anticipation of litigation or for trial; disclosure of this material is required only on a showing of substantial need and that the party is unable to obtain the substantial equivalent material by other means.

Salvation Army v. Bryson, 229 Ariz. 204, 273 P.3d 656, ¶¶ 10–13 (Ct. App. 2012) (court made statements about work-product privilege, but addressed issue under attorney-client privilege).

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver.

502.b.010 A disclosure does not operate as a waiver in an Arizona proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Arizona Rule of Civil Procedure 26.1(f)(2).

Lund v. Myers, 230 Ariz. 445, 286 P.3d 789, ¶¶ 15–18 (Ct. App. 2012) (Bradford's relatives (Millers) asked court to appoint guardian and conservator for Bradford; Millers' attorney (Murphy) served subpoena on Bradford's former law firm (JS&S) asking for all "nonprivileged" documents; attorney at JS&S erroneously thought Murphy represented Bradford and thus thought there was no reason to review file for privileged document, and therefore provided Murphy with 239 pages of records, stating it was "a full and complete copy" of the JS&S file; 2 weeks later, Bradford's attorney (Shumway) contacted attorney at JS&S, told him about the subpoena, and said Bradford intended to object to subpoena; this was first indication to attorney at JS&S that Murphy did not represent Bradford; Shumway then contacted Murphy, told him about the inadvertent disclosure, said file contained privileged information and that he would review file to determine what was privileged, and asked to have the file returned to him; Murphy said he would await word on which documents Shumway considered privileged; by 3 weeks later, Murphy had not heard anything from Shumway, so Murphy distributed copies of the entire file to all other counsel in the litigation; court found (1) disclosure was inadvertent; (2) Shumway took reasonable steps to prevent disclosure; and (3) Shumway promptly took reasonable steps to rectify error, thus court concluded there was no waiver of attorney-client privilege).

ARTICLE 6. WITNESSES

Rule 602. Need for Personal Knowledge.

602.010 For a witness to testify about a matter, the witness must have personal knowledge of the matter.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 55–57 (Ct. App. 2012) (plaintiff's statement of fact about who gave him documents was based on his own knowledge, and thus statement was not hearsay).

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Rule 702. Testimony by Expert Witnesses.

702.030 Expert opinion testimony is admissible if it will assist the trier-of-fact to understand the evidence or to determine a fact in issue.

State v. Sosnowicz, 229 Ariz. 90, 270 P.3d 917, ¶¶ 15–26 (Ct. App. 2012) (defendant drove his vehicle over victim, and claimed it was accident; state claimed defendant either intentionally, knowingly, or recklessly drove over victim; medical examiner testified manner of death was homicide; because medical examiner's opinion was based on information he had received from police officers and not on any specialized knowledge or personal examination of body, court held that testimony essentially was ultimate issue in case and did not assist jurors in determining case, thus trial court should not have admitted that testimony, but any error was harmless).

702.050 A witness may qualify as an expert on the basis of training and education.

Escamilla v. Cuello, 230 Ariz. 202, 282 P.3d 403, ¶¶ 18–23 (Ct. App. 2012) (expert witness testified candidate did not have sufficient English language proficiency to fulfill duties as member of city council; candidate contested expert witness's qualifications; court reviewed expert witness's training education, knowledge, experience, and testing methods, and concluded trial court did not abuse discretion in admitting expert witness's testimony).

702.060 A witness may qualify as an expert on the basis of knowledge and experience.

Escamilla v. Cuello, 230 Ariz. 202, 282 P.3d 403, ¶¶ 18–23 (Ct. App. 2012) (expert witness testified candidate did not have sufficient English language proficiency to fulfill duties as member of city council; candidate contested expert witness's qualifications; court reviewed expert witness's training education, knowledge, experience, and testing methods, and concluded trial court did not abuse discretion in admitting expert witness's testimony).

702.075 Under A.R.S. § 12–2603, if a claim against a health care professional is asserted in a civil action, the claimant (or attorney) shall certify in a written statement filed and served with the claim whether or not expert opinion testimony is necessary to prove the health care professional's standard of care or liability for the claim, and if the certification is that expert testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial Rule 26.1 disclosures.

Para v. Anderson, 231 Ariz. 91, 290 P.3d 1214, ¶ 2 (Ct. App. 2012) (plaintiff sued multiple medical corporations and doctors for negligence and wrongful death, and named certain doctor as expert witness who would testify particular defendant doctor's treatment fell below standard of care).

702.077 Under A.R.S. § 12–2603, if the claimant certifies that expert opinion testimony is necessary to prove the health care professional's standard of care or liability for the claim and identifies the expert who will testify, that expert is subject to deposition, and if the party later re-designates that expert as a consulting expert, that expert is still subject to deposition, but any use of that expert's testimony at trial is subject to limitation under Rule 403.

Para v. Anderson, 231 Ariz. 91, 290 P.3d 1214, ¶¶ 2–15 (Ct. App. 2012) (plaintiff sued multiple medical corporations and doctors for negligence and wrongful death, and named certain doctor as expert witness who would testify particular defendant doctor's treatment fell below standard of care; plaintiff settled with that particular defendant doctor, whereupon other defendants designated that particular defendant doctor as non-party at fault and sought to depose expert witness doctor; plaintiff filed notice purporting to name expert witness doctor as consulting expert only and sought to have trial court preclude deposition or other discovery; court held expert witness doctor was still subject to deposition and other discovery, but use of testimony at trial is subject to limitation under Rule 403).

702.081 A.R.S. § 12–2604 applies in an action alleging medical malpractice, and thus applies to an action alleging medical malpractice under the Medical Malpractice Act (MMA), and to an action alleging medical malpractice under the Adult Protective Services Act (APSA).

Cornerstone Hosp. v. Marner, 231 Ariz. 67, 290 P.3d 460, ¶¶ 10–28 (Ct. App. 2012) (decedent, whowas vulnerable adult as defined by APSA, received treatment that fell below applicable standard of care; court held A.R.S. § 12–2604 applied, and concluded expert witness who was registered nurse (RN) was qualified to testify about standards of care for RNs, licensed practical nurses (LPN), and certified nursing assistants (CNA)).

702.082 If the party against whom the testimony is offered is or claims to be a specialist or board-certified specialist, then A.R.S. § 12–2604 requires that the expert witness must be a specialist or board-certified specialist, and this requirement applies whether or not the party against whom the testimony is offered was acting as a specialist at the time of the occurrence that is the basis for the action.

Cornerstone Hosp. v. Marner, 231 Ariz. 67, 290 P.3d 460, ¶¶ 30–42 (Ct. App. 2012) (decedent, who was vulnerable adult as defined by APSA, received treatment that fell below applicable standard of care; court held A.R.S. § 12–2604 applied, and concluded expert witness who was registered nurse (RN) was qualified to testify about standards of care for RNs, licensed practical nurses (LPN), and certified nursing assistants (CNA)).

702.086 Under A.R.S. § 12–2604, the witness offering testimony must be a specialist or a board-certified specialist, and this is determined by the party's and the witness's specialty and not the party's and the witness's sub-specialty.

Baker v. University Physicians Health., 228 Ariz. 587, 269 P.3d 1211, ¶¶ 4–15 (Ct. App. 2012) (defendant-physician was a board-certified specialist in pediatrics with a sub-specialty in pediatric hematology, and was treating 17-year-old patient for blood clots; patient then died from blood clots; plaintiff retained expert witness who was board certified in internal medicine with sub-specialties in oncology and hematology; court held because defendant-physician was board-certified in pediatrics and witness was board certified in internal medicine, expert witness did not qualify under statute; court held (1) qualification was not based on nature of injury involved; (2) qualification was based on specialty and not on sub-specialty, and (3) it did not matter that decedent-patient was 17 years old and thus did not need to be treated by pediatrician).

702.088 Under A.R.S. § 12–2604, the witness offering testimony must be a specialist or a board-certified specialist the same as the party's specialty; when the party has multiple specialties, the relevant specialty is determined by the area within which the party was operating.

Lo v. Lee, 230 Ariz. 457, 286 P.3d 801, ¶¶ 5–16 (Ct. App. 2012) (plaintiff brought suit against defendant doctor who had performed "laser facial skin treatment"; defendant doctor was board-certified ophthalmologist with claimed sub-specialty in oculoplastic surgery; plaintiff's standard-of-care expert was board-certified plastic surgeon; defendant doctor contended plaintiff's expert did not qualify because he was not an ophthalmologist; trial court considered defendant doctor specialist in cosmetic plastic surgery, and considered procedure he performed on plaintiff to fall under that specialty, and thus found plaintiff's board-certified plastic surgeon qualified as witness; on appeal, court noted ABMS description of ophthalmology included surgery, but did not include plastic surgery; defendant doctor acknowledged plastic surgeons performed facial laser resurfacing such as he performed on plaintiff, but contended that, because that procedure also is performed by ophthalmologists with his claimed sub-specialty in oculoplastic surgery, plaintiff was required to have ophthalmologist as expert witness, and thus plaintiff's standard-of-care expert did not qualify because he was not ophthalmologist; defendant doctor asserted he was not claiming specialty in plastic surgery, but was instead ophthalmologist performing cosmetic surgery; based on defendant doctor's claims on website, court concluded he claimed specialty in plastic surgery; court concluded that, when party had multiple specialties, testifying expert did not have to match all specialties and instead only had to match relevant specialty, and thus concluded relevant specialty here was plastic surgery, thus plaintiff's board-certified plastic surgeon satisfied statutory requirement).

702.207 In a medical malpractice case, the plaintiff has the burden of proving its case, and thus there is no burden on the defendant to disprove anything, thus all the defendant's expert witness need do is testify about other possible causes of the injury.

Benkendorf v. Advanced Card. Spec., 228 Ariz. 528, 269 P.3d 704, ¶¶ 8–18 (Ct. App. 2012) (decedent died of intracranial hemorrhage; plaintiff's expert witness gave opinion that negligently and adjusting Coumadin dosages caused death; trial court properly allowed defendant's expert witness to testify that decedent's age, hypertension, removal of kidney tumor, and history of stroke were possible causes of death).

Rule 703. Bases of an Expert's Opinion Testimony.

703.095 If an expert witness discloses the facts or data only for the limited purpose of disclosing the basis of the opinion, they are not substantive evidence and admission of those facts and data does not violate the right of confrontation.

State v. Joseph, 230 Ariz. 296, 283 P.3d 27, ¶¶ 7–13 (2012) (to prepare for testimony, medical examiner reviewed autopsy report prepared by doctor who did not testify; because (1) autopsy report was not admitted in evidence, (2) medical examiner used facts only as basis of his opinion, and (3) medical examiner formed his own opinion, allowing medical examiner to testify based on that autopsy report did not violate defendant's right of confrontation).

Rule 704. Opinion on an Ultimate Issue.

704.020 Testimony must assist the jurors to understand the evidence or to determine a fact in issue and not merely tell the jurors how they should decide the case.

State v. Sosnowicz, 229 Ariz. 90, 270 P.3d 917, ¶¶ 15–26 (Ct. App. 2012) (defendant drove his vehicle over victim, and claimed it was accident; state claimed defendant either intentionally, knowingly, or recklessly drove over victim; medical examiner testified manner of death was homicide; because medical examiner's opinion was based on information he had received from police officers and not on any specialized knowledge or personal examination of body, court held that testimony essentially was ultimate issue in case and did not assist jurors in determining case, thus trial court should not have admitted that testimony, but any error was harmless).

704.035 Although an expert may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, a witness may disclose to jurors those facts that caused the witness not to believe a particular person.

State v. Martinez, 230 Ariz. 382, 284 P.3d 893, ¶¶ 10–13 (Ct. App. 2012) (after defendant successfully fled from law enforcement vehicle, he later called police and reported someone had stolen his vehicle; in opening statement and on cross-examination of officer, defendant's attorney implied officer was less than diligent in his investigation of stolen vehicle claim; officer permitted to testify defendant's actions were standoffish and odd, and defendant's "story did not match up; it seemed like [defendant] was being evasive and lying"; court held officer's testimony was necessary to explain why officer did not continue to investigate alleged stolen vehicle).

ARTICLE 8. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay.

801.005 In order for an out-of-court statement to be considered "testimonial evidence," the declarant must have made the statement to an agent of the state.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶ 48 n.15 (Ct. App. 2012) (defendant challenged admission of statements made by co-conspirators; court noted defendant did not explain why out-of-court statements about events prior to his involvement in conspiracy should be considered testimonial in nature).

801.070 If the out-of-court statement is not the functional equivalent of in-court testimony or was not made under circumstances that the declarant would reasonably expect to be available at trial against a particular defendant, it will not be considered a "testimonial statement" or "testimonial evidence" and thus its admissibility will be controlled by the rules governing hearsay statements.

State v. Shivers, 230 Ariz. 91, 280 P.3d 635, ¶¶ 11–15 (Ct. App. 2012) (defendant charged with interfering with judicial process; defendant contended admission of written declaration of service of order of protection without testimony of officer who served it on him violated his Sixth Amendment rights; court concluded written declaration was non-testimonial because officer created it primarily for administrative purposes rather than prosecutorial purposes; mere possibility document might later be used in future prosecution did not render it testimonial).

801.110 The Confrontation Clause does not apply to statements made by co-conspirators.

State v. Tucker, 231 Ariz. 125, 290 P.3d 1248, ¶ 49 (Ct. App. 2012) (defendant challenged admission of statements made by co-conspirators; court noted there is no requirement that co-conspirator's statement satisfy the Confrontation Clause to be admissible).

Rule 801(a). Definitions That Apply to This Article; Exclusions from Hearsay — Statement.

801.a.010 If verbal or nonverbal conduct is not intended to be an assertion, by definition it is not hearsay, even if it is offered as evidence of the declarant's implicit belief of a fact.

State v. Palmer, 229 Ariz. 64, 270 P.3d 891, ¶¶ 4–10 (Ct. App. 2012) (hospital employee (B.C.) testified she found methamphetamine in backpack that had been transferred from ambulance that had brought defendant to hospital; on cross-examination, B.C. acknowledged backpack had not been inventoried along with defendant's other belongings and had been removed by two women who had come into defendant's trauma bay after B.C. found the methamphetamine; on re-direct, B.C. testified women asked defendant where is your backpack; defendant contended B.C.'s testimony about what women asked was hearsay; court held statement women made was not intended as assertion and thus was not hearsay, even though women acted as they did because of their belief in existence of condition sought to be proved, i.e., that backpack belonged to defendant).

Rule 801(d)(1)(A). Definitions That Apply to This Article; Exclusions from Hearsay — Statements that are not hearsay: Prior inconsistent statement.

801.d.1.A.070 If the witness cannot remember making a prior statement, the prior statement is admissible if the trial court determines the witness is feigning loss of memory, or if the trial court is not able to determine whether the witness is feigning loss of memory or if the loss of memory is real and record suggests reasons for witness to be evasive.

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 55–61 (2012) (trial court did not find and record did not suggest person making statement feigned lack of memory, and because person was one of shooting victims, person would have no apparent reason to do so, thus trial court erred in concluding statement was prior inconsistent statement, but in light of other evidence, any error in admission of statement was harmless).

Rule 801(d)(2)(A). Definitions That Apply to This Article; Exclusions from Hearsay — Statements that are not hearsay: Party-opponent's own admission.

801.d.2.A.005 A party's statement is admissible.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 55–57 (Ct. App. 2012) (in support of plaintiffs' motion for summary judgment, plaintiffs included deposition from one plaintiff [Beus] stating what Sara Taylor Hickey [Taylor] told him about source of computer disk that had on it damaging information; because Taylor was married to a defendant [Hickey] at time of her statement to Beus and was a defendant in litigation, her statement was admissible as statement of party opponent).

Rule 803(2). Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness — Excited utterances.

803.2.003 Statements made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency are not testimonial.

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 62–67 (2012) (for each statement, officer was one of first to arrive a scene of shooting, and one officer explained he questioned victim in order to secure scene and meet on-going emergency; each victim described where he was standing and vehicle from where shot was fired; court held each statement was excited utterance and not testimonial).

803.2.010 This rule has three requirements: (1) there must be a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made soon enough after the event so that the declarant does not have time to fabricate.

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 64–65 (2012) (officer was one of first to arrive a scene of shooting; victim described where he was standing and vehicle from where shot was fired; court held statement met three necessary requirements).

State v. Hausner, 230 Ariz. 60, 280 P.3d 604, ¶¶ 66–67 (2012) (officer was one of first to arrive a scene of shooting; victim said he was in much pain and described vehicle from where shot was fired; court held statement was excited utterance).

Rule 804(b)(3). Exceptions to the Rule Against Hearsay—When the Declarant Is Unavailable as a Witness — Statements against interest.

804.b.3.005 For a statement to be admissible under this exception: (1) the declarant must be unavailable; (2) the statement must be against the declarant's interest; and (3) there must be corroborating evidence that indicates the statement's trustworthiness.

Cal X-tra v. W.V.S.V. Holdings, 229 Ariz. 377, 276 P.3d 11, ¶¶ 55–57 (Ct. App. 2012) (in support of plaintiffs' motion for summary judgment, plaintiffs included deposition from one plaintiff [Beus] stating what Sara Taylor Hickey [Taylor] told him about source of computer disk that had on it damaging information; because Taylor was now dead and her statements about computer disk were against her pecuniary interest, her statements were admissible even if hearsay).